No. 88 5348

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

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SUPREME COURT, U. S.

ROBEPT J. FARMER, Petitioner,

v.

DIRECTOR OF NEVADA DEPARTMENT OF PRISONS,

Respondent.

Supreme Court, U.S.
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PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

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QUESTION PRESENTED

Does this Court's decision in Booth v. Maryland, 482 U.S. _____ (1987), barring the use of victim impact statements at capital sentencings, apply retroactively to cases pending on collateral review on the date Booth was decided?

TABLE OF CONTENTS

		Page
Question Presented		i
Table of Authorities		iv
Opinion Below		1
Jurisdiction		1
Constitutional Provision Involved		1
Statement of the Case		1
Reasons for Granting the Writ		6
I.	THE NEVADA SUPREME COURT DECLINED TO APPLY BOOTH V. MARYLAND TO THIS CASE EXPRESSLY BECAUSE THIS COURT HAS NOT YET RULED REGARDING BOOTH'S RETROACTIVE APPLICATION TO PENDING HABEAS CORPUS CASES.	6
II.	ALLOWING FARMER'S DEATH SENTENCE TO STAND, PROCURED AS IT WAS THROUGH THE USE OF VICTIM IMPACT INFORMATION, CONFLICTS WITH THE RULE OF BOOTH V. MARYLAND.	8
III.	BOOTH V. MARYLAND SHOULD BE GIVEN COMPLETE RETROACTIVE EFFECT, THAT IS, IT SHOULD APPLY EVEN TO CASES PREVIOUSLY AFFIRMED ON DIRECT APPEAL.	11
	A. Booth v. Maryland Applies Retroactively Because It Did Not Announce A New Constitutional Rule But Merely Applied Settled Legal Principles To A Particular Factual Setting.	12
	B. Assuming Arguendo That Booth v. Maryland Did Announce A New Rule, Then It Should Still Be Fully Retroactive.	13
IV.	THE NEVADA COURT'S DECISION DID NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.	19

TABLE OF CONTENTS
Continued

	Page
Conclusion	22
Appendix	
Order Dismissing Appeal	1a
Order Denying Rehearing	7a

TABLE OF AUTHORITIES

	Page
CASES	
Allen v. Hardy, 478 U.S. 255 (1986)	15, 19
Booth v. Maryland, 482 U.S. ____, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987)	passim
Caldwell v. Mississippi, 472 U.S. 320 (1985)	22
Desist v. United States, 394 U.S. 244 (1969)	15
Enmund v. Florida, 458 U.S. 782 (1982)	9
Gregg v. Georgia, 428 U.S. 153 (1976)	12, 13
Griffith v. Kentucky, 479 U.S. ____, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987)	11, 14
Linkletter v. Walker, 381 U.S. 618 (1965)	14, 15, 16, 17
McCullogh v. State, 99 Nev. 72, 657 P.2d 1157 (1983)	20, 21
Michigan v. Long, 463 U.S. 1032 (1983)	19
Post v. Ohio, ____ U.S. ____, 108 S.Ct. 1061 (1988)	9, 10
Rogers v. Warden, 86 Nev. 359, 468 P.2d 993 (1970)	21
Solem v. Stumes, 465 U.S. 638 (1984)	7, 15, 16, 18 20

TABLE OF AUTHORITIES
(continued)

	Page
State v. Post, 32 Ohio St.3d 380, 513 N.E.2d 754 (Ohio 1987), cert. denied sub nom. Post v. Ohio, ____ U.S. ____, 108 S.Ct. 1061 (1988)	9
Teague v. Lane, ____ U.S. ____, 108 S.Ct. 1106 (1988)	15
United States v. Johnson, 457 U.S. 537 (1982)	12, 13
Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974)	20
Witherspoon v. Illinois, 391 U.S. 510 (1968)	16, 17
Woodson v. North Carolina, 428 U.S. 280 (1976)	16
Yates v. Aiken, 484 U.S. ____, 98 L.Ed.2d 546, 108 S.Ct. 534 (1988)	12, 14, 17, 18
Zant v. Stephens, 462 U.S. 862 (1983)	9, 10, 13
STATUTES	
28 U.S.C. § 1257(3)	2

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT J. FARMER, Petitioner,

v.

DIRECTOR OF NEVADA DEPARTMENT OF PRISONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEVADA SUPREME COURT

The petitioner, Robert Jeffrey Farmer, respectfully prays that a writ of certiorari issue to review the order of the Nevada Supreme Court dismissing his appeal, entered in the proceeding below on March 31, 1988, and the order denying rehearing, which was entered on June 23, 1988.

OPINIONS BELOW

The written opinion of the Nevada Supreme Court, its Order Dismissing Appeal, is unreported and is reproduced in the appendix hereto, p. 1a, infra. The subsequent order denying reconsideration is also unreported and is reproduced in the appendix hereto, p. 7a, infra.

JURISDICTION

The Nevada Supreme Court's Order Dismissing Appeal was filed on March 31, 1988, and its Order Denying Reconsideration was filed on June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On March 26, 1984, petitioner Robert Farmer (hereafter "Farmer") pleaded guilty to the murder of Greg Gelunas, which had occurred in Las Vegas, Nevada on January 19, 1982. The State of Nevada sought the death penalty, and a penalty hearing was held before a three-judge panel on May 10 and 11, 1984.

At the hearing, the state prosecutor argued for imposition of the death penalty and, in support of his argument, relied on two distinct items of "victim impact" information.

The first item related to the impact of the Gelunas murder on the victim's mother. At the close of his evidence at the penalty phase, the prosecutor indicated that he was not calling the victim's mother to testify "because of her mental state." Record on Appeal (Vol.II) at 513, Farmer v. Director, No. 18052 (Nev. S.Ct.). He reported the following concerning the impact of the crime on the victim's mother:

> You cannot talk to her about this case to this day, -- this occurred two and-a-half years ago. To this day when you talk to her about it she will break down and cry. I mean each and every time. It has had an extreme emotional impact on this woman.

Id. Again, in his final argument to the sentencing panel, the prosecutor stressed the impact of the murder on the victim's mother:

> It is not only the lives that he [Farmer] took. It is the very personality, the profile of this particular individual that I am asking to terminate. I'm asking that this Court terminate his life.
>
> I did not call Greg Gelunas' mother, as I previously indicated. I spoke to her just last night. But I can tell the Court that not only did he kill two human beings, he certainly shattered some other lives psychologically.
>
> And, of course, that happens any time a human being is killed, I suppose. And I can't isolate this case as being any exception.
>
> But it is an exception in the sense that there were two killings. And so we simply double the number of people, other people who were killed -- I'm sorry. Who were injured as a result of Mr. Farmer's actions.
>
> Mrs. Gelunas, I can represent to the Court, is an extremely emotionally distraught woman, to this day. She, to this date, she has doctor's help. To this date, she, at least reports to me, to have repeated nightmares, crying, and I can see the crying for myself. Extremely emotionally traumatic.

> And Mr. Farmer, I'm certain in his mind, never gave it a thought. Never thought about the victims. Never gave the families of the victims, a thought.

Id. at 620. Farmer's attorney made no objection to the prosecutor's reference to the impact of the murder on Mrs. Gelunas. Likewise, Farmer's attorney made no objection to the above reference to two killings -- even though one of them was a homicide unrelated to the Gelunas murder.

The second item of victim impact information the prosecutor relied on concerned a kidnapping unrelated to the Gelunas murder. One Linda Cobb testified that on January 16, 1982, three days before the Gelunas murder in Las Vegas, Farmer stole her car and kidnapped her and her 13-year old son near Reno, Nevada. The prosecutor asked Mrs. Cobb, "Has this episode had any affect [sic] on you . . . . ? Mrs. Cobb replied that Farmer "could have absolutely destroyed [her] life . . . . " She reported changing her job, residence, and automobile. Id. at 445. The prosecutor then asked about the effect of the kidnapping on her son. Mrs. Cobb gave the following reply:

> Well, I'm not a child psychology expert. However I don't know if it's relatable to his age or something that is a result of this incident. But we are having problems with my son and he is now living with my ex-husband in an effort to try and find out what is wrong.

Id. at 445-446. Farmer's attorney did not object to this

testimony.

The three-judge panel subsequently sentenced Farmer to "be punished by death." The Nevada Supreme Court affirmed his conviction and sentence on direct appeal on August 27, 1985. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985). Farmer then petitioned this Court for a writ of certiorari, which was denied on May 19, 1986.

On September 19, 1986, Farmer filed a state petition for a writ of habeas corpus challenging his conviction and sentence. The state district court denied relief by an order entered on March 20, 1987. Farmer filed a timely appeal to the Nevada Supreme Court.

Between the filing of Farmer's notice of appeal (April 6, 1987) and the filing of his opening brief in the Nevada Supreme Court (July 22, 1987), this Court decided Booth v. Maryland, 482 U.S. _____ (decided June 15, 1987) and forebade the use of victim impact statements in capital sentencing proceedings.

In his opening brief, filed about five weeks after Booth, Farmer raised for the first time the question whether the use of victim impact information at his sentencing violated the eighth amendment. Appellant's Opening Brief at 21, Farmer v. Director, No. 18052 (Nev. S.Ct.). In its answering brief, Respondent candidly stated, "There is no question that some of the statements and evidence presented to the three-judge panel at the penalty hearing were inappropriate under the recent decision

in Booth v. Maryland." Respondent's Answering Brief at 15, Farmer v. Director, supra (filed September 9, 1987).

Noting that Farmer's sentence was affirmed on direct appeal before Booth, the Nevada Supreme Court declined to apply Booth retroactively. The court stated, "The United States Supreme Court has not defined the limits of retroactive application of the Booth decision, and absent the high court's direction we will not extend the application of that decision to the degree which reversal [of] this case would require." Farmer v. Director, No. 18052, Order Dismissing Appeal at 2-3 (March 31, 1988) (reproduced in appendix infra).

In the instant petition, Farmer seeks review of the Nevada Supreme Court's refusal to apply Booth to his case absent this Court's direction.

REASONS FOR GRANTING THE WRIT

I. THE NEVADA SUPREME COURT DECLINED TO APPLY BOOTH V. MARYLAND TO THIS CASE EXPRESSLY BECAUSE THIS COURT HAS NOT YET RULED REGARDING BOOTH'S RETROACTIVE APPLICATION TO PENDING HABEAS CORPUS CASES.

In Booth v. Maryland, 482 U.S. ____, 96 L.Ed 2d 440, 107 S.Ct. 2529 (1987), this Court held that the introduction of victim impact information at the penalty phase of a capital trial violates the eighth amendment. As discussed in the Statement of the Case, supra, Farmer was sentenced to death after the

sentencing panel received victim impact information concerning the Las Vegas murder for which he was being tried as well as victim impact information concerning unrelated prior crimes. Before the Nevada Supreme Court, on appeal from the denial of post-conviction relief, Respondent conceded that "there is no question that some of the statements and evidence presented to the three-judge panel at the penalty hearing were inappropriate under the recent decision in Booth v. Maryland." Respondent's Answering Brief at 15, Farmer v. Director, No. 18052 (Nev. S.Ct.). Noting that Farmer's conviction was affirmed on direct appeal before Booth was decided, the Nevada Supreme Court nevertheless declined to apply Booth, saying as follows: "The United States Supreme Court has not defined the limits of retroactive application of the Booth decision, and absent the high court's direction we will not extend the application of that decision to the degree which reversal [of] this case would require." See Order Dismissing Appeal at 2-3 (reproduced in appendix), citing Solem v. Stumes, 465 U.S. 638 (1983). The Nevada Supreme Court in effect held that Booth would not apply retroactively to a capital case where the conviction was affirmed on direct appeal before the date Booth was decided.

Neither in Booth nor in any subsequent case has this Court decided whether Booth will be given full retroactive application. Farmer submits that this case merits review by this Court so that the question of Booth's retroactive application can

be resolved. The Nevada Supreme Court has allowed Farmer's death sentence to stand even though it was obtained in violation of the eighth amendment, as explicated by Booth. Assuming Booth is given full retroactive application, the Nevada Supreme Court's decision upholding Farmer's sentence is in conflict with Booth. The question of Booth's retroactivity is a question that has not, but should be, settled by this Court.

II. ALLOWING FARMER'S DEATH SENTENCE TO STAND, PROCURED AS IT WAS THROUGH THE USE OF VICTIM IMPACT INFORMATION, CONFLICTS WITH THE RULE OF BOOTH V. MARYLAND.

As discussed in the Statement of the Case, supra, Farmer was sentenced to death after the sentencing panel received victim impact information. This information can be divided into two categories: (1) the impact of the Gelunas murder on the victim's mother; and (2) the impact of an unrelated prior kidnapping and robbery on a different victim and her son.

Under Booth v. Maryland, a death sentence based on victim impact information violates the eighth amendment. The first category of victim impact information relied on here, the impact of the crime on the murder victim's mother, is exactly the type of information Booth forbids. In Booth, this Court held that the "emotional impact of the crimes on the family" is "irrelevant to a capital sentencing decision." 96 L.Ed.2d at 448.

The second category of victim impact information, the testimony regarding the impact of a prior and unrelated kidnapping and robbery, is even more objectionable. The principle underlying Booth is that a capital sentencing decision must be based on the character of the accused and the circumstances of the crime for which he is being sentenced. Booth, 96 L.Ed.2d at 448, quoting Zant v. Stephens, 462 U.S. 862, 879 (1983). Any other factor considered by the sentencing body must bear on the accused's "'personal responsibility and moral guilt.'" Id., quoting Enmund v. Florida, 458 U.S. 782, 801 (1982). The victim impact of Farmer's unrelated prior offenses is even less relevant than the victim impact of the crime for which he was being sentenced. Since Booth forbids the latter type of victim impact information, it must necessarily by implication forbid the former: the impact of prior unrelated crimes was wholly irrelevant to the decision whether to sentence Farmer to death for the Gelunas murder. Farmer's death sentence was, therefore, obtained in violation of Booth.

Although the Nevada Supreme Court did not reach the issue, some lower courts have refused to apply Booth where, as here, the sentencing decision was made by a judge, not a jury. E.g., State v. Post, 32 Ohio St.3d 380, 513 N.E.2d 754 (Ohio 1987), cert. denied sub nom. Post v. Ohio, ____ U.S. ____, 108 S.Ct. 1061 (1988). These cases are wrongly decided. The creation by these lower courts of a "judge's exception" is

inconsistent with Booth. The precise holding in Booth is stated in the first paragraph of section III of the Opinion: "[T]he introduction of a VIS at the sentencing phase of a capital murder trial violates the eighth amendment . . . ." 96 L.Ed.2d at 452. The holding in Booth was unqualified and not limited to those cases where the sentencing body is a jury. If victim impact information is irrelevant to a capital sentencing decision, it remains irrelevant regardless of whether the judge or jury makes the decision. In this case, the prosecutor introduced significant victim impact information and argued for the death penalty based upon that information. Nothing in the record below suggested that the three-judge panel sentencing Farmer to death was immune to this type of appeal or that the panel assigned the victim impact information no weight in its deliberations. As in Booth, there is too great a risk that Farmer's death sentence is "based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" Booth, 96 L.Ed. at 448, quoting Zant v. Stephens, 462 U.S. at 885. See also Post v. Ohio, ____ U.S.____, 108 S.Ct. 1061, 1062-1063 (1988) (Marshall, J., dissenting from the denial of certiorari).

Farmer's sentence of death cannot stand - if Booth applies retroactively to his conviction. The question of Booth's retroactivity is taken up next.

III. BOOTH V. MARYLAND SHOULD BE GIVEN COMPLETE RETROACTIVE EFFECT, THAT IS, IT SHOULD APPLY EVEN TO CASES PREVIOUSLY AFFIRMED ON DIRECT APPEAL.

This Court announced its decision in Booth on June 15, 1987. Had Farmer's case been pending on direct appeal at that time, Booth would apply to this case as a matter of course. See Griffith v. Kentucky, 479 U.S. ____, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987). The problem is that Farmer's conviction was affirmed on direct appeal in August 1985. After losing his direct appeal, Farmer filed a petition for writ of certiorari with this Court which was denied on May 19, 1986. Subsequently, in September 1986, Farmer filed a petition for writ of habeas corpus in state court. He did not receive a final decision on his petition until March 1987. On April 6, 1987, Farmer filed a timely notice of appeal to the Nevada Supreme Court. His opening brief in the Nevada Supreme Court was filed on July 22, 1987.

Between the time Farmer filed his notice of appeal from the denial of his habeas corpus petition (April 6, 1987) and the time he filed his opening brief in the Nevada Supreme Court (July 22, 1987), this Court announced its decision in Booth (June 15, 1987). Farmer raised his claim under Booth for the first time in his opening brief.

The Booth decision should be available to Farmer in collaterally attacking his sentence for the reasons set forth below.

A. Booth v. Maryland Applies Retroactively Because It Did Not Announce A New Constitutional Rule But Merely Applied Settled Legal Principles To A Particular Factual Setting.

If the holding of a new decision of this Court merely involves the application of "settled precedents" to a new and different factual setting, it is a "foregone conclusion" that the holding will apply retroactively. United States v. Johnson, 457 U.S. 537, 549 (1982). More precisely, in such a situation, the holding will apply even to state habeas petitioners (like Farmer) whose convictions were final before the decision in question. Yates v. Aiken, 484 U.S. ____, 98 L.Ed.2d 546, 108 S.Ct. 534 (1988).

Booth did not announce a new rule at all: it merely involved the application of existing principles to the particular facts presented in that case. In holding victim impact information inadmissible in a capital sentencing proceeding, the Court relied on the "well-settled" principle that the sentencing body's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Booth 96 L.Ed.2d at 448, quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Further, this Court relied on its more specific holding that the sentencing body must make an "individualized determination" of

whether to impose death on the defendant based on "the character of the individual and the circumstances of the crime." Id., quoting Zant v. Stephens, supra (emphasis in original). In Booth, this Court merely decided, for the reasons stated in that opinion, that the principle announced in Gregg and amplified in Zant and other cases prohibits the use of victim impact information in a capital sentencing proceeding. These principles were established well before Farmer's trial and conviction in 1984. Thus, Booth was not a novel holding and no "real question" of retroactivity is raised. Johnson, 472 U.S. at 549. As a matter of course, the result reached in Booth is the result to be reached in all cases, even those where the convictions were final at the time Booth was decided.

B. Assuming Arguendo That Booth v. Maryland Did Announce A New Rule, Then It Should Still Be Fully Retroactive.

Even assuming that Booth did announce a new rule raising a "real question" of retroactivity, Booth should still apply retroactively to cases like Farmer's, where the death sentence was affirmed on direct appeal before the date Booth was decided.

The methodology to be used to decide the retroactive application of a new holding to such cases is unclear. Traditionally, this Court has used a three-pronged analysis

derived from Linkletter v. Walker, 381 U.S. 618 (1965) to decide the scope of a holding's retroactivity. In the very recent past, individual Members of this Court have urged adoption of an approach, identified with Justice Harlan, in lieu of the Linkletter test. E.g., Griffith v. Kentucky, 93 L.Ed.2d at 662 (Powell, J., concurring). Last term, this Court left undecided the question of which of these two approaches is the appropriate one for deciding whether to apply a new holding to collateral attacks on already final criminal convictions. See Yates v. Aiken, 98 L.Ed.2d at 553.

Virtually every criminal law decision of this Court raises a question regarding the extent of its retroactive application. The Court has resolved this problem in part by adopting a "bright line" rule that makes new holdings retroactive in all cases pending on direct appeal. Griffith v. Kentucky, 93 L.Ed.2d. at 661. The motivating force behind this decision was, apparently, the desire to avoid the troublesome and often inquitable case-by-case approach of Linkletter. Id. at 658-659 and 661. With reference to applying a new decision to pending habeas corpus cases, however, this Court has not resolved whether to adhere to the Linkletter approach or to adopt "Justice Harlan's theory." Yates, 98 L.Ed.2d. at 553.

One of the important issues to be addressed in briefs

on the merits in this case would, therefore, be which of these approaches should be used to determine the retroactivity of Booth's application to a previously final conviction. See also Teague v. Lane, ____ U.S. ____, 108 S.Ct.1106 (1988) (granting certiorari in case presenting question of retroactive application to case pending on collateral review).

The Linkletter approach would militate in favor of giving Booth full retroactive effect. Under that approach, this Court would determine the scope of a new decision's retroactivity by "weigh[ing] the merits and demerits in each case." Linkletter, 381 U.S. at 629. Specifically, the Court evaluates these three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Allen v. Hardy, 478 U.S. 255, 258 (1986) (preliminary print). The first one, the purpose to be served by the new constitutional rule, is the most important of the three. Desist v. United States, 394 U.S. 244, 249 (1969). Thus, "[c]omplete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." Solem v. Stumes, 465 U.S. 638, 643 (1984).

If this Court grants the requested writ, the parties in

this case as well as any amici can address each of the three factors in detail. Preliminarily, Farmer contends that the first factor would be particularly weighty here and, indeed, decisive in favor of Booth's full retroactive application.

The purpose of the rule in Booth is to "enhance the accuracy of criminal trials." See Solem, 465 U.S. at 643. More specifically, Booth is designed to prevent arbitrary and capricious imposition of the death penalty, that is, it is designed to help prevent the ultimate penalty from being imposed in violation of the eighth amendment. Death is a "punishment different from all other sanctions." Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). If a sentence of death is wrongly imposed and executed, there is no remedy. It is therefore critical that capital sentencing decisions be accompanied by the highest safeguards to prevent an inappropriate sentence of death. Given the paramount importance of the first Linkletter factor in capital cases, the balance should tip in favor of giving Booth full retroactive application.

Witherspoon v. Illinois, 391 U.S. 510 (1968) is instructive on this point. There, this Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death

penalty . . . ." 391 U.S. at 522. Using the Linkletter approach, this Court indicated its holding was to be given "fully retroactive application." 391 U.S. at 523 n.22. The Court reasoned that, notwithstanding the second and third Linkletter factors, the forbidden jury selection practice "necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate . . . ." Id. Similarly, introduction of victim impact information necessarily undermined the integrity of the process that decided Farmer's fate. Booth, 96 L.Ed.2d. at 448. Consistent with Witherspoon, Booth should be given complete retroactive application under the Linkletter test.

Even were this Court to reject the Linkletter approach, Booth should still apply retroactively to Farmer's case. At this point in the development of retroactivity case law, the major alternative approach to Linkletter is "Justice Harlan's theory." See Yates, 98 L.Ed.2d. at 553. Under this approach, the general rule is that a "newly-announced constitutional rule should not be applied retroactively to cases pending on collateral review." Id. Assuming arguendo that Booth announced a novel holding, Farmer would be precluded from invoking Booth under Justice Harlan's general rule because his case is pending on collateral review rather than on direct appeal.

The general rule does admit of exceptions, however. One exception is where the holding is "implicit in the concept of

ordered liberty." Yates, 98 L.Ed.2d. at 553. A new holding within this exception will be given full retroactive effect because fundamental fairness so requires. Solem v. Stumes, 465 U.S. at 653, esp. n.4 (Powell, J., concurring).

Fundamental fairness requires the full retroactive application of the rule of Booth. At the foundation of any civilized legal system is the tenet that similarly situated persons should be treated alike. If Booth is not given full retroactive effect, then a legally-drawn line divides persons sentenced to death based on victim impact information. On one side of that line would be the persons whose convictions were not final when Booth was announced. These persons could claim Booth's protection. On the other side of the line are those whose convictions, like Farmer's, were final before the date Booth was decided. Refusing to give Booth full retroactive effect would deny this latter group Booth's protection - and it would deny that protection, letting them be executed, for no reason other than the fact that their convictions were final before Booth was decided. The underlying constitutional problem with using victim impact information remains the same, regardless of the date on which a capital defendant's conviction became final: a death sentence, regardless of the date of its entry or the date on which it became final, remains infected with "constitutionally unacceptable" error if it was based on victim

impact information. Booth, 96 L.Ed.2d. at 448.

If Booth announced a merely procedural rule having only "some impact" on the truth finding process in capital litigation, denying its benefit to persons based on the date their convictions became final would be constitutionally acceptable and less morally troublesome. See Allen v. Hardy, 92 L.Ed.2d at 205. Because Booth has a "fundamental impact" on the integrity of capital sentencing decisions, however, retroactive application is appropriate. Id.

IV. THE NEVADA COURT'S DECISION DID NOT REST ON AN ADEQUATE OR INDEPENDENT STATE GROUND.

In opposing review by certiorari, Respondent will undoubtedly argue that the Nevada Supreme Court's decision rested on an "adequate and independent state ground" and that, therefore, this Court lacks jurisdiction to review that decision. See Michigan v. Long, 463 U.S. 1032 (1983). That argument should be rejected.

In its written decision, the Nevada Supreme Court addressed Farmer's claim under Booth v. Maryland and refused to apply it to Farmer "absent direction from the high court" that Booth applies retroactively. On the face of the opinion, the state court declined to apply the constitutional doctrine of Booth and in effect held it non-retroactive to convictions final before Booth was decided. Order Dismissing Appeal at 2-3

(reproduced in appendix). The question of Booth's retroactive application is itself a federal question; and, in declining to apply Booth, the only precedent relied on by the Nevada Supreme Court was a federal one. Id. at 3, citing Solem v. Stumes, supra. The decision of that court turned on a question of federal law, and this Court has jurisdiction to review it.

Admittedly, however, the Nevada Supreme Court's written decision does suggest that the court might have also believed that Farmer's claim under Booth was barred by a state "procedural default." Order Dismissing Appeal at 2 (reproduced in appendix). That possible default apparently consists of the fact that Farmer did not raise the Booth issue at his original penalty hearing but raised it for the first time on appeal from the denial of his state habeas petition. Id.

Despite the arguable availability of a state ground for its decision, the Nevada Supreme Court proceeded to address the Booth issue. One possible explanation is that the court might have overlooked the arguable default if it had agreed with Farmer on the merits of the Booth issue. The Nevada Supreme Court has discretion to allow an issue to be raised for the first time on appeal. McCullogh v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983). And, Nevada courts generally have discretion to relieve a petitioner in collateral proceedings of a procedural default so that he or she can raise an otherwise barred claim. See, e.g., Warden v. Lischko, 90 Nev. 221, 222-223, 523 P.2d 6, 7 (1974),

One of the considerations influencing a Nevada court to allow a petitioner to raise an otherwise procedurally defaulted claim is whether the claim is constitutional in nature. McCullogh, 90 Nev. at 222-223, 523 P.2d at 7; Rogers v. Warden, 86 Nev. 359, 362, 468 P.2d 993, 994 (1970). It is possible, therefore, that the Nevada Supreme Court's holding on the federal claim under Booth influenced its view of the state question of procedural default. Had the court resolved the federal issue regarding Booth's retroactivity in Farmer's favor, it might have exercised its discretion to consider the claim notwithstanding the arguable default. Under this view, the procedural default issue would be intertwined with the question of Booth's retroactivity.

In any event, this Court need not resolve the troublesome issue whether the decision below rested on a state or federal ground. The Nevada Supreme Court discussed both the state issue of procedural default and the federal issue of Booth's retroactivity. In this instance, the Court's jurisdiction is presumed:

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. Moreover, we will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of

any possible state law ground is not clear from the face of the opinion.

Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (authorities omitted). This Court has jurisdiction to review the Nevada Supreme Court's decision.

CONCLUSION

For the above reasons, petitioner Farmer asks that the petition for a writ of certiorari be granted and this matter set for briefing on the merits.

RESPECTFULLY SUBMITTED,

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